

FILED '08 JAN 11 14:43 USDC-ORE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

| | | |
|---------------------------------|---|-----------------------|
| J. SCOTT EBERZ, |) | |
| |) | |
| Plaintiff, |) | Civ. No. 06-CV-641-TC |
| |) | |
| vs. |) | |
| |) | |
| |) | ORDER AND OPINION |
| |) | |
| OREGON DEPARTMENT OF STATE |) | |
| POLICE, and Agency of the |) | |
| State of Oregon, ALFRED C. |) | |
| BATHKE, JAMES RAGON, aka JIM |) | |
| RAGON, CRAIG DURBIN, |) | |
| CYNTHIA KOK, PETER SPIRRUP, and |) | |
| DAVID REESE, |) | |
| |) | |
| Defendants. |) | |

Coffin, Magistrate Judge:

Before the court is plaintiff's Motion to Dismiss Defendant Oregon State Police's Counterclaims (#127). For the reasons that follow, I decline to exercise supplemental jurisdiction over the counterclaims and dismiss them without prejudice on that basis.

Background and Discussion

Plaintiff brought a number of claims against his employer, Oregon State Police (OSP), stemming from allegations that he

1 Opinion and Order

1 suffered retaliation and termination for reporting related to
2 certain billing practices associated with casino licensing.
3 Plaintiff remains employed by OSP during this litigation,
4 although he was earlier terminated based on events at issue in
5 this suit and then reinstated after an arbitration proceeding.

6 OSP asserts that evidence surfaced during the discovery
7 process indicating that plaintiff disclosed privileged and
8 confidential information gathered in his capacity as an
9 investigator for gaming license applicants. OSP further argues
10 that, had this information been included in an arbitration
11 proceeding held after plaintiff's termination, he would not have
12 been reinstated as an OSP employee. In OSP's view, plaintiff was
13 not entitled to reinstatement due to the alleged misconduct, and
14 his current employment was made possible only due to plaintiff's
15 misrepresentations about the alleged misconduct.

16 Based primarily on this theory, OSP asserts counterclaims of
17 (1) Money Had and Received; (2) Fraudulent Misrepresentation; and
18 (3) Breach of Fiduciary Duty. OSP contends that damages
19 resulting from the torts consist of wages paid to plaintiff
20 during the period after his reinstatement, which was (in their
21 view) made under false pretenses.

22 Plaintiff asserts that Oregon law cannot support any of the
23 three claims. Relief on Money Had and Received requires a
24 demonstration of indebtedness from defendant to plaintiff and
25 defendant's lack of rights to money owed. Adams v. Crater Well
26 Drilling, 556 P.2d 679, 680 n.3 (Or. 1976). Here, plaintiff
27 argues that the essence of the claim is predicated on the breach
28 of confidentiality and other terms in plaintiff's employment

1 arrangement with OSP; as such, it is a thinly disguised contract
2 or employment claim. It is unclear whether Money Had and
3 Received finds application under these circumstances; no Oregon
4 case law demonstrates that wages earned in employment sustained
5 under deception can constitute the type of indebtedness required
6 to state such a claim.

7 With respect to Fraudulent Misrepresentation, OSP must
8 demonstrate that plaintiff deceived OSP into continuing his
9 employment and that OSP was damaged as a result of relying on
10 plaintiff's alleged misrepresentations. See generally Williams
11 v. Collins, 600 P.2d 1235 (Or. App. 1979) (illustrating
12 elements). As plaintiff asserts, the claim is based on the
13 contention that plaintiff violated some obligations owed under
14 his employment with OSP, and that OSP suffers harm by continuing
15 to employ a person who has disclosed investigative or other
16 information, and who has violated certain personnel policies.
17 The court finds no clear authority in Oregon law that would allow
18 an employer to state a tort claim to remediate the situation that
19 OSP alleges.

20 Similarly, OSP's Breach of Fiduciary Duty counterclaim tests
21 the boundaries of Oregon law. In OSP's view, plaintiff had
22 independent fiduciary duties to OSP arising not from his
23 employment arrangement, but from statute, oath, and conduct code,
24 which included the duty to safeguard confidential information.
25 Plaintiff asserts that the nature and scope of plaintiff's duties
26 to OSP inhere in the employment relationship, and he correctly
27 explains that Oregon law instead contemplates fiduciary duties in
28 the context of arm's-length agency relationships, such as those

1 between a realtor and client, attorney and client, or physician
2 and patient. See generally, Conway v. Pacific University, 924
3 P.2d 818, 823-24 (Or. 1996) (describing heightened duties in
4 trade relationships). Oregon law has not addressed the question
5 of an officer's fiduciary duty to his public employer.

6 Finally, in plaintiff's view, an award of damages in the
7 amount of plaintiff's salary with respect to any of the
8 counterclaims would have the effect of "terminating" plaintiff
9 notwithstanding his reinstatement pursuant to the arbitration
10 proceeding. In other words, a damage award that would require
11 plaintiff to pay back his wages and essentially work for free
12 would have the effect of ending his current employment. As such,
13 the relief sought would constitute a termination outside the
14 parameters of the Collective Bargaining Agreement to which
15 plaintiff and OSP are mutually bound.

16 OSP agrees that application of these tort theories within
17 the context of an employee-employer relationship would be novel
18 and, given the current state of the law in Oregon, unusual.

19 The court may decline to exercise its supplemental
20 jurisdiction over state law claims that require resolution of
21 novel legal questions. See 28 U.S.C. § 1367(c) ("The district
22 courts may decline to exercise supplemental jurisdiction over a
23 claim under subsection if the claim raises a novel or complex
24 issue of State law[.]") (internal section numbers omitted);
25 O'Connor v. State of Nevada, 27 F.3d 357, 363 (9th Cir. 1994).
26 Because OSP raises counterclaims that raise novel, complex, and
27 indeed imaginative issues of Oregon tort law, the court declines
28 to exercise its supplemental jurisdiction over those claims.

1
2 Conclusion

3 Plaintiff's motion to dismiss (#127) is granted. OSP's
4 counterclaims are dismissed without prejudice.
5

6 IT IS SO ORDERED.
7

8 Dated this 11th day of January, 2008.
9

10 
11 _____
12 THOMAS M. COFFIN
13 United States Magistrate Judge
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28